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IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1986
No. _____

DANIEL McCARTHY, Petitioner,

v.

NARDELL U. CARTER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I

Whether a state's failure to advise a defendant of a post-prison parole period renders his guilty plea unconstitutionally involuntary.

II

Whether, assuming such failure to advise renders the plea involuntary, principles of federalism allow a federal court in habeas corpus to free the defendant from parole, rather than merely to afford the defendant an opportunity to withdraw the plea.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit granting habeas corpus relief appears as Appendix A to this petition and is reported in Carter v. McCarthy, 806 F.2d 1373 (9th Cir. 1986). A copy of the Ninth Circuit's order denying the petition for rehearing and rejecting the suggestion for rehearing en banc appears as Appendix B. The judgment of the United States District Court and its findings granting habeas corpus relief appears as Appendix C.

JURISDICTION

The Court of Appeals' decision was filed on December 23, 1986. (Appendix A.) On February 23, 1987, an order was filed denying the petition for rehearing and rejecting the suggestion for rehearing en banc. (Appendix B.) The period during which the petition for rehearing was pending tolled the period in which the petition for certiorari must be filed. Department of Banking v. Pink, 317 U.S. 264, 266 (1942); Gypsy Oil Company v. Escoe, 275 U.S. 498 (1927). Thus, this petition is timely filed. 28 U.S.C. 2101(c). This Court's jurisdiction is being invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that: "No state shall . . . deprive any person of life, liberty, or property, without due process of law; . . ." U.S. Const., Amend. XIV, § 1.

California Penal Code section 3000, subdivision (a), provides that:

> "At the expiration of a term of imprisonment of one year and one day, or a term of imprisonment imposed pursuant to Section 1170, . . . the inmate shall be released on parole for a period not exceeding three years, unless the board for good cause waives parole and discharges

the inmate from custody of the department."

California Penal Code, section 1170, subdivision (c), provides that:

"The court shall state the reasons for its sentence choice on the record at the time of sentencing. The court shall also inform the defendant that as part of the sentence after expiration of the term he or she may be on parole for a period as provided in Section 3000."

STATEMENT OF THE CASE

In 1981, respondent Nardell Carter was charged, in thirteen felony counts consolidated into two cases, with forgery and possession of stolen checks. Pursuant to a plea agreement on December 9, 1981, respondent pleaded guilty in state court to two counts of forgery and possession of stolen checks, with the understanding that he would receive a prison sentence of two years. The trial court found that his pleas were knowingly and intelligently made. The plea agreement did not address the conditions of parole eligibility or release, the prosecutor made no express promise as to parole, and apparently neither the state court nor the

prosecutor informed respondent of post-prison parole. (C.R. p. 8, Exh. A.)1/

On January 8, 1982, the trial court imposed a concurrent two-year state prison sentence on each count. (C.R. p. 8, Exh. B.) Less than one year later, on December 14, 1982, respondent was released from custody and placed on parole. He signed an agreement form advising him that conduct prohibited by law could result in revocation of parole even if no criminal conviction occurred. He did not then legally challenge his parole or its conditions. (C.R. p. 8, Exhs. C and D.)

Less than seven months later, on July 2, 1983, respondent was arrested for residential burglary. He also was discovered in possession of stolen credit cards. (C.R. p.

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1. C.R. refers to Petitioner's Excerpt of the Clerk's Record on Appeal in the United States Court of Appeals for the Ninth Circuit.

8, Exhs. D and E.) He was found to be in violation of parole on September 28, 1983. His parole was revoked, and he was ordered returned to custody for a twelve-month period. (C.R. p. 8, Exh. F.) Although he filed an administrative appeal with the California Department of Corrections' Board of Prison Terms, he did not at that time object that he was not properly subject to parole. (C.R. p. 8, Exh. H.)

Respondent filed petitions for writ of habeas corpus in the superior court and California Court of Appeal. They were denied, respectively, in February and March, 1984. His petition for writ of habeas corpus in the California Supreme Court, alleging that his imprisonment was illegal because he had not been informed of the possibility of

parole at the time of his plea, was denied in April, 1984. (C.R. Exhs. J, K, and L.)

Respondent filed a petition for writ of habeas corpus in the United States District Court, Central District of California, on April 30, 1984. (C.R. p. 1.) The United States Magistrate ordered an evidentiary hearing to determine whether respondent knew of the parole requirement when he pleaded guilty and whether he would have pleaded guilty if he had known of the parole requirement. (C.R. p. 11.) After the hearing, the magistrate recommended that respondent's petition be granted because imposition of parole was a substantial additional penalty to which he had not agreed, violating the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Magistrate found that

respondent did not know that he would be required to serve a parole term after he completed his prison sentence, and that he would not have entered a guilty plea if he had known that he would be required to serve a term of parole after completion of his prison term. (C.R. pp. 18, 20.) On July 29, 1985, the District Court granted the petition for writ of habeas corpus and ordered that respondent be released from any further parole attributable to his guilty plea. (C.R. p. 21.)

In September, 1985, petitioner appealed to the United States Court of Appeals for the Ninth Circuit. (C.R. p. 29.) The Court of Appeals held, in a published opinion filed December 23, 1986, that: (1) where a criminal statute imposes a mandatory parole term to be served following completion of the prison

sentence, the parole term is a direct consequence of the guilty plea; (2) respondent's plea was not voluntary and intelligent because he had not been fully aware of the parole period; and (3) the proper remedy was "specific performance" of the agreement, so that respondent should be released from any further service of the parole term. (Appendix A.) Petitioner's petition for rehearing and suggestion for rehearing en banc in the Court of Appeals were denied on February 23, 1987. (Appendix B.)

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

ARGUMENT

I

THIS CASE SQUARELY PRESENTS THE CONSTITUTIONAL ISSUE SPECIFICALLY LEFT OPEN IN THIS COURT'S OPINION IN UNITED STATES V. TIMMRECK AND LANE V. WILLIAMS

In this case, respondent's guilty plea was accompanied by advisement as to the charges against him; by express advisement and waiver of his constitutional rights; by advisement that he would receive a prison term of two years; and by advisement of

consequences his plea might carry with regard to probation and potential future uses of his conviction against him in terms of deportation if he was not a United States citizen. He was not formally advised that he would be subject to a three-year parole period at the end of his term of imprisonment. Pursuant to his plea, respondent indeed received both his bargained-for two-year prison term, and the dismissal of eleven other felony counts against him. Finding that respondent was unaware of the parole provision and would not have pleaded guilty if he had been aware, the courts below concluded that respondent's guilty plea was involuntary.

In United States v. Timmreck, 441 U.S. 780 (1979), this Court held that a mere technical violation of Rule 11 of the Federal

Rules of Criminal Procedure, requiring the court to advise a defendant about a mandatory special parole term appended to his prison term, was not itself sufficient to invalidate the defendant's guilty plea in collateral attack. 441 U.S. at pp. 784-785. But the court left open the question of the availability of habeas corpus relief where the rule violation "occurred in the context of other aggravating circumstances"; for in Timmreck the defendant did not even allege that he had been unaware of the parole provision when he entered his plea or that he otherwise would not have pleaded guilty. Ibid., at p. 784.

Two years later, in Lane v. Williams, 455 U.S. 624 (1981), this Court "granted certiorari to consider whether the failure of the trial court to advise respondents of [a]

mandatory parole requirement before accepting their guilty pleas deprived them of Due Process of Law." 455 U.S. at p. 625. In deciding that case, however, the Court left the question open, for the release of the defendants from parole had rendered the issue moot. Ibid., at p. 634.

This case presents the Court with the questions left open in Lane and Timmreck. Here, the defendant claimed and the district court found that he was unaware of the parole period and that he would not have pleaded guilty had he been aware of it. And the state in this case has taken no action to release respondent from parole, other than mere compliance with the District Court's order that is here challenged. Moreover, petitioner's concomitant claim that the choice of remedy was improper also serves to

maintain this case as a live controversy. This Court should grant certiorari to resolve the constitutional questions left unanswered in its previous opinions. See American Textile Mfrs. Institute v. Donovan 452 U.S. 490, 495 (1981).

II

THIS CASE PRESENTS AN OCCASION FOR RESOLUTION OF A CONFLICT IN PRINCIPLE AMONG THE CIRCUIT COURTS ON THE ISSUE OF WHETHER MANDATORY PAROLE IS A "DIRECT CONSEQUENCE" OF A GUILTY PLEA

The opinion of the Ninth Circuit Court of Appeals below conflicts in principle with those of other circuits on the critical issue of whether a post-prison parole term is a direct, rather than a collateral, consequence of a guilty plea. This Court, in Boykin v. Alabama, 395 U.S. 238 (1969), held that due process requires a defendant's guilty plea be voluntary and intelligent. This Court then held, in Brady v. United States, 397 U.S. 742

(1970), that a guilty plea can be voluntary only if it is "entered by one fully aware of the direct consequences" of his plea. In the instant case, the Ninth Circuit held that, where a criminal statute provides for a parole term to be served following completion of the period of physical confinement, the parole term necessarily is a direct consequence of the guilty plea. This conclusion, which was integral to the Court of Appeals' determination that respondent's guilty plea was not voluntary and intelligent, conflicts in principle with the views of other Circuit Courts of Appeals.

Several Circuits hold that advisement of parole eligibility is not required to satisfy Federal due process, because the parole consequences of a guilty plea are collateral. The Sixth Circuit has held that a court's

failure to advise about parole in eligibility, or its misadvice in the form of an erroneous underestimate about the date of the accused's eligibility, does not involve a direct consequence of a guilty plea. Brown v. Perini, 718 F.2d 784, 788 (6th Cir. 1983). The Second Circuit, in Hunter v. Fogg, 616 F.2d 55 (2d Cir. 1980), held that a guilty plea could not be vacated merely because the defendant was not told when, if ever, he might be eligible for parole. The Fourth Circuit Court of Appeals indicated in Strader v. Garrison, 611 F.2d 61 (4th Cir. 1979) that parole eligibility is a collateral consequence of a guilty plea. And the Fifth Circuit has held that the trial court need not advise the defendant of parole eligibility. United States v. Garcia, 636 F.2d 122, 123, (5th Cir. 1981). The Seventh

Circuit, however, has held that the failure of the prosecutor and the trial court to advise a defendant of a mandatory parole term constituted a substantial addition to the term which he was promised, thereby unfairly inducing his plea in violation of due process. Baker v. Finkbeiner, 551 F.2d 180 (7th Cir. 1977).

Parole consequences under the California Penal Code are a collateral consequence of a defendant's guilty plea. Penal Code section 3000 states that the Board of Prison Terms may waive parole and that the ultimate decision of whether a defendant must serve a period of parole is within the sole discretion of the Board and not the sentencing court. The decision to grant parole in California is a function of the Board of Prison Terms, an agency separate

from the state courts, which determines whether and for how long a state defendant will serve a term of parole. Petitioner urges this Court to grant certiorari to resolve the conflict in principle between the decision below and opinions of other federal Courts of Appeals.

III

THE DECISION BELOW IS PLAINLY CONTRARY TO THIS COURT'S OPINION IN LANE V. WILLIAMS

Petitioner established at the evidentiary hearing before the United States Magistrate that respondent in 1978 entered into a previous plea bargain with terms similar to those in this case. He served a state prison sentence and was placed on parole by the California Department of Corrections in 1979. He served periods of custody for violating parole and eventually was discharged from that parole. (C.R., Exhs. R, S, and T.) Respondent admitted at the hearing that the state parole agent had informed him in 1979 of mandatory parole. (C.R. 26, R.T. 41, 84-85.) As this Court noted in Lane v.

Williams, supra, 455 U.S. 624, at page 634, "Respondents are now acutely aware of the fact that a criminal sentence in Illinois will include a special parole term. Any future guilty plea will not be open to the same constitutional attack." In upholding respondent's constitutional attack on his guilty plea, despite the fact that respondent in the past had become aware of and had served a similar mandatory parole period, the decision below conflicts with this Court's recognition in Lane that such a claim necessarily cannot be deemed valid. A writ of certiorari should issue to correct this conflict.

IV

THIS CASE PRESENTS AN IMPORTANT ISSUE OF COMITY AND FEDERALISM: WHETHER A FEDERAL COURT IN HABEAS CORPUS, IN REMEDYING A DEFENDANT'S INVOLUNTARY PLEA, SHOULD IN EFFECT RESTRAIN THE OPERATION OF STATE-LAW PAROLE PROVISIONS AGAINST HIM, RATHER THAN SIMPLY ALLOW HIM TO WITHDRAW HIS PLEA IN STATE-COURT PROCEEDINGS

Rather than remand the case to the state court to allow respondent an opportunity to withdraw his plea and allow the prosecution to reinstate some or all of the eleven dismissed counts, the Court of Appeals below ordered a complete discharge of respondent's

remaining parole term. The Court of Appeals cited Santobello v. New York, 404 U.S. 257 (1971), which held that, where a petitioner has relied on a promise by the state in a plea agreement which has not been fulfilled, either withdrawal of the plea or specific performance of the agreement may be an appropriate remedy. The Court of Appeals held that the District Court acted properly in not remanding the case to the state court and in ordering that respondent be released from further service under the parole term, since he already had been imprisoned longer than the term for which he had bargained.

The remedy of allowing the guilty plea to stand and ordering respondent's release arguably might be appropriate when the prosecution breaks its part of the plea bargain, thus making the bargain voidable.

But in this case, respondent's plea-bargain never promised that he would be free of post-prison parole. This Court has held that a plea is void and the conviction cannot stand when an unconditional plea is shown not to be voluntary and intelligent on the grounds that the accused did not appreciate the direct consequences of the guilty plea. See Boykin v. Alabama (1969) 395 U.S. 238. The Court of Appeals in this case applied an unwarranted remedy. Instead, setting aside the plea and remanding the case to the sentencing court would be particularly appropriate in cases like the present case, where respondent assertedly was induced into pleading guilty because he believed that he would not have to serve parole after a brief prison term, rather than because myriad felony counts against him were dismissed. Otherwise, the

effect is an unjustified restraint on the operation of valid state parole laws, and to frustrate the state's enforcement of the penal statutes involved in the dismissed counts. Such consequences represent an unjustified denigration of constitutional principles of federalism. In this context "specific performance" unjustly might totally free prisoners who had been allowed to plead guilty to a fraction of the felony counts confronting them at the time of their plea.

Moreover, state resources will be drained in an effort to respond to self-serving allegations of prisoners claiming that they would not have pleaded guilty to a fraction of the felony counts charged against them if they had known that they would have to serve a parole period after release from prison. A multiplicity of evidentiary

hearings, involving witnesses recounting minutiae of their understandings of guilty pleas from the distant past, will increase judicial work and delay the administration of justice. As Mr. Justice Stevens has noted:

> "[T]he concern with finality served by the limitation on collateral attack [fn.] has special force with respect to convictions based on guilty

pleas. [¶] 'Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.' [Citation.]" United States v. Timmreck, supra, at p. 784.

Finally, this state has a vital stake in having prisoners serve their periods of parole following their terms, particularly when the prosecution has dismissed counts which could have greatly lengthened their prison terms. Under the Court of Appeals' holding in this case, prisoners well might be allowed to free themselves of their part of the plea bargain, while the state's expectation of parole, undoubtedly relied upon by the state in its decision to dismiss counts or to reduce prison time, will be vitiated.

The opinion below also will frustrate the California Board of Prison Terms' key policy of having prisoners serve supervised periods of parole rather than being directly discharged into the community at the public's risk.

The harsh remedy of specific performance mandated by the Court of Appeals for the Ninth Circuit, the large number of cases adversely affected by the opinion below, the drain on state resources, and the frustration of important state interests, warrant a grant of this petition for writ of certiorari.

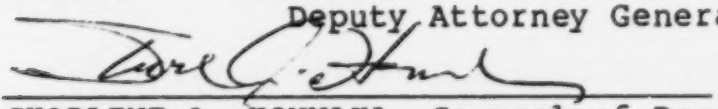
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CONCLUSION

For the foregoing reasons, petitioner requests that this Court grant this petition for writ of certiorari and, upon review, reverse the Court of Appeals' decision granting habeas corpus relief.

Respectfully submitted,

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APPENDIX A

NARDELL U. CARTER, Plaintiff-Appellee,

v.

DANIEL MC CARTHY, Midge Carroll,
JOHN K. Van De Kamp,

Defendants-Appellants.

No. 85-6299

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Sept. 30, 1986

Decided Dec. 23, 1986.

Appeal from the United States District Court
for the Central District of California,
Edward Rafeedie, Judge Presiding

Before ALARCON, BOOCHEVER and REINHARDT, Circuit Judges.

REINHARDT, Circuit Judge:

We resolve here a question previously unaddressed by this circuit, i.e., whether a guilty plea is voluntarily and intelligently made when the trial judge fails to inform the accused of a mandatory parole term concomitant to the sentence. We hold it is not.

Nardell Carter was arrested and charged in 1981 with forgery and possession of stolen checks. He pleaded guilty pursuant to a plea bargain under which he was to receive a two-year sentence. He was then sentenced to a two-year term in state prison. His conviction was subject to Cal. Penal Code § 3000(a) (Deering 1980), which imposes mandatory parole for a period not to exceed

three years. The court failed to inform him of this requirement either at the time it accepted his plea or at the time it imposed sentence.

After serving about sixteen months of his sentence, Carter was released on a three-year parole term. Less than seven months later, he was arrested on charges of burglary and possession of stolen credit cards. Although the charges were dismissed for lack of evidence, the California Board of Prison Terms revoked Carter's parole and returned him to state prison where he served an additional year. About three months after his release, while still subject to the three-year parole term, Carter was arrested again on similar charges. The Board of Prison Terms again revoked his parole and placed him in custody for another year. By

this time more than three years had elapsed since Carter had commenced serving his bargained-for two-year sentence and he had already spent two years and four months in prison.

Carter filed a petition for writ of habeas corpus in state court, naming Daniel McCarthy, director of the California Department of Corrections, as defendant. Carter asserted that the court's failure to inform of the mandatory parole term at the time of his plea violated his due process rights. After exhausting his state remedies, Carter filed a petition for a writ of habeas corpus in federal district court.

A federal magistrate conducted a fact-finding hearing and recommended granting habeas relief. The district court adopted the magistrate's findings and recommendation,

and issued a writ ordering that Carter be released from custody on any charges related to his parole violations. At that time, Carter had been incarcerated for almost ten additional months and had only two months left to serve in connection with his second parole violation. McCarthy filed a timely appeal.

Generally, we review de novo the decision to grant or deny a petition for writ of habeas corpus. See Weygandt v. Ducharme, 774 F.2d 1491, 1492 (9th Cir. 1985). However, to the extent that we are required to review a magistrate's findings of fact and a district court's adoption of such findings, we apply a clearly erroneous standard. Fed.R.Civ.P. 52(a); see United States v. Guido, 597 F.2d 194, 197-98 (9th Cir. 1979).

Constitutional protections of due process mandate that an accused's guilty plea be voluntary and intelligent. Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711-12, 23 L.Ed.2d 274 (1969). Because a guilty plea waives the rights against self-incrimination, to trial by jury, and to confront one's accusers, its acceptance requires the "utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." Id. 243-44, 89 S.Ct. at 1712.

Determining the voluntariness of a plea involves a review of all the relevant circumstances surrounding it. Brady v. United States, 397 U.S. 742, 749, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747 (1970). Among

other circumstances, a plea of guilty can be voluntary only if it is "entered by one fully aware of the direct consequences" of his plea. Id. at 755, 90 S.Ct. at 1472 (emphasis supplied). Thus the proper initial inquiry here is whether a mandatory parole term is a direct consequence of a guilty plea, or merely a collateral one. If a mandatory parole term is a direct consequence, we must then determine whether Carter was fully aware that he was subject to that additional penalty.

McCarthy asserts that all parole consequences are collateral and thus not afforded due process protection, citing Hill v. Lockhart, ___ U.S. ___, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); United States v. Garcia, 636 F.2d 122, 123 (5th Cir. 1981) (per curiam); Hunter v. Fogg, 616 F.2d 55, 61 (2nd

Cir. 1980); Strader v. Garrison, 611 F.2d 61, 63 (4th Cir. 1979). These cases are readily distinguished. Each deals with the failure to inform a defendant of when he will become eligible for release from incarceration under the sentence he received, not with the failure to inform him of the existence of a separate parole term to be served following service of that sentence. The date of eligibility for parole relates to the time at which the sentence actually imposed may in effect be reduced, at least insofar as the requirement for serving time in prison is concerned. Early release is purely discretionary and provides a benefit to the prisoner -- a reduction in the period of confinement. On the other hand, a mandatory parole term involves the imposition of an additional adverse consequence upon the

defendant -- a substantial period of time during which his freedom is limited significantly commencing after the defendant has served his sentence of imprisonment.

A California appellate court has held that a mandatory parole term imposed pursuant to the same statute involved here, Cal. Penal Code § 3000, is "an inexorable penal consequence" of a guilty plea. In re Carabes, 144 Cal.App.3d 927, 930-31, 193 Cal.Rptr. 65 (1983). In addition, the Seventh Circuit has held that the failure to inform a defendant of a mandatory parole term is a violation of due process, implicitly recognizing it to be a direct rather than a collateral consequence of a guilty plea. United States ex rel. Baker v. Finkbeiner, 551 F.2d 180 (7th Cir. 1977); United States

ex rel. Johnson v. DeRobertis, 718 F.2d 209, 210-11 (7th Cir. 1983).[1]

We agree with the view expressed in In re Carabes and implicitly recognized by the Seventh Circuit. Where a criminal statute imposes a mandatory parole term to be served following completion of the period of confinement, the parole term necessarily is a direct consequence of the guilty plea. Here, Cal.Pen. Code § 3000(a) requires a period of parole to be served following completion of the period of incarceration; Carter's parole term is thus a direct consequence of his plea.

McCarthy argues that parole is not mandatory because the same section allows the Board of Prison Terms to waive parole. Id. Waiver, however, is a positive act solely within the discretion of the Board, in the

absence of which the parole remains mandatory. See In re Carabes, 144 Cal.App.3d at 931, 193 Cal.Rpt. 65. More important, for purposes of determining whether a plea is voluntarily and intelligently made, the critical fact is not that the imposition of the parole term is mandatory but that the parole term is to be served in addition to the term of confinement under the sentence. In these circumstances, the judge handling the criminal proceedings must advise the defendant, inter alia, of the maximum period of his liberty may be restrained both by way of imprisonment and parole.

Under Brady, we need still determine whether Carter was "fully aware" of the direct consequence of his plea. Brady v. United States, 397 U.S. at 755, 90 S.Ct. at 1472. Here, the magistrate specifically

found that Carter did not know of the requirement of a mandatory parole term. The district judge agreed. We have reviewed the record and the findings carefully. While on the basis of the written record we might not have reached the same conclusion as the magistrate and the district court, we do not have the benefit of having observed the witnesses; nor can we substitute our judgment as to the facts for that of the district court. Given all of the circumstances present here, we cannot hold that the finding below is clearly erroneous. Inasmuch as Carter was not fully aware of the direct consequences of his guilty plea, the plea was not voluntary and intelligent; acceptance of the plea in these circumstances was a violation of Carter's constitutional right of due process.[2]

United States v. Timmreck, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979), is not to the contrary. In Timmreck, the Supreme Court held only that a claim of a violation of Federal Rule of Criminal Procedure 11 is not sufficient, without more, to support a collateral attack on a defendant's conviction. See also Wayne v. Raines, 690 F.2d 685, 687 (9th Cir. 1982) (applying Timmreck to a violation of a state rule of criminal procedure). While Timmreck, like the case before us, involved a failure to inform the defendant prior to his guilty plea of the requirement of a mandatory parole term, Timmreck's "only claim [was] of a technical violation of the Rule." 441 U.S. at 784, 99 S.Ct. at 2087. Unlike Carter, Timmreck did not argue that he was unaware of

the mandatory parole term or that he would not have pleaded guilty had he known.[3]

In short, he did not contend that his plea was involuntary or that his constitutional rights were violated.[4]

Because we have found constitutional error here, we apply the rule of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), arguendo, and consider whether the state met its burden of showing beyond a reasonable doubt that the error was harmless. Under Chapman, constitutional errors do not automatically require reversal of a conviction; an otherwise valid conviction will not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt. Id. at 24, 87 S.Ct. at 828; Delaware v. Van

Arsdall, ___ U.S. ___, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986). However, the harmless error rule does not benefit the state in this case. At Carter's fact-finding hearing, the magistrate found that had Carter known of the mandatory parole term, he would not have pleaded guilty. The district judge agreed. As with the other factual determinations, we cannot conclude that the finding of fact was clearly erroneous. In view of the finding that knowledge of the parole requirement would have altered Carter's plea, the constitutional error was clearly not harmless.

Next, McCarthy contends that the district court should have remanded the case to state court to make the requisite factual findings instead of accepting those made by a federal magistrate. Remand to a state court may

under some circumstances be appropriate where that court has previously made evidentiary findings on the particular matters at issue. Here, the state courts summarily dismissed Carter's petitions without an evidentiary hearing. In such cases, the district court must hold its own evidentiary hearing. 28 U.S.C. § 2254(d).

There remains the matter of remedy. In Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), the Court held that where a petitioner has relied on a promise by the state in a plea agreement which has not been fulfilled, either withdrawal of the plea or specific performance of the agreement may be an appropriate remedy. Id. at 263, 92 S.Ct. at 499. McCarthy asserts that Santobello requires us to remand the proceedings to the

state court so that it may make a choice between those remedies. While the Court in Santobello did order a remand, it did not hold that remand was appropriate in every case, or as a general course. See, e.g., Lane v. Williams, 455 U.S. 624, 630, 102 S.Ct. 1322, 1326, 71 L.Ed.2d 508 (1982). Since Carter has already served a sentence well in excess of the one for which he bargained, leave to withdraw his plea would clearly be of no benefit to him. We see no reason to remand a habeas case to state court where there is no choice to be made and but one possible order to be issued. Moreover, had the district court failed to act as it did, Carter might well have completed service of his illegal sentence before he received the relief to which he was entitled. The district court was correct in not remanding

the proceeding to the state court and in ordering that Carter be released from any further service under the parole term.

AFFIRMED.

ALARCON, Circuit Judge, concurring:

I concur for the reasons set forth in footnote 2 of the court's opinion.

1. The facts of Baker v. Finkbeiner are almost identical to those present here. Baker agreed to plead guilty in exchange for a promise that his sentence would not exceed two years. His attorney, the prosecutor and the trial judge all failed to inform him that Illinois law required that he serve two years of parole after his prison term ended. The Seventh Circuit held that Baker's guilty plea was subject to collateral attack if the sentence actually imposed differed significantly from the sentence promised him. 551 F.2d at 183. The court went on to find that a two-year parole term was a significant addition to his sentence, and concluded that the failure to inform Baker of the mandatory parole term

violated his due process rights. Id. at 184.

2. This case also involves the violation of a state rule of criminal procedure. Under California law, the state trial judge must inform the defendant of a mandatory parole term that will follow service of a determinate sentence. Cal.Penal Code § 1170(c). Our circuit has held that a collateral attack based on a violation of a state rule of criminal procedure will succeed, and a due process violation will be found, when the petitioner shows that he was prejudiced or that his rights were affected thereby. Wayne v. Raines, 690 F.2d 685, 687 (9th Cir. 1982) (state rule of criminal procedure required disclosure

of parole eligibility limitations prior to accepting guilty plea.) It is clear, therefore, that were we to rest our decision on the state rule violation, we would not avoid the constitutional question. Accordingly, we see no reason to rely on that alternative ground.

3. Timmreck's claim of a Rule 11 violation was termed only a "technical" one for an additional reason. The sum of the prison sentence and parole term imposed did not exceed the maximum sentence that the judge informed Timmreck he could receive. In Carter's case, the period of limitation on his freedom exceeded the maximum period he was advised he would receive at the time of the plea.

4. There is another reason why Timmreck is inapplicable and why the parole term imposed on Carter cannot be enforced. Timmreck did not involve a plea-sentence agreement, i.e., a plea of guilty in exchange for a promise that a specific sentence would be ordered or that the sentence would not exceed a particular term. See United States ex rel. Johnson v. DeRobertis, 718 F.2d 209, 210 (7th Cir. 1983). When a promise or agreement by the prosecutor is part of the consideration inducing a defendant's plea, a sentence that exceeds the promise cannot be enforced over the defendant's objections. Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 499, 30 L.Ed.2d 427 (1971). Carter agreed to plead guilty in return for a sentence of

two years' imprisonment. Instead, he received a sentence of two years' imprisonment and an additional three-year parole term. The parole term exceeded the sentence Carter had been promised.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NARDELL U. CARTER,	NO. 85-6299
Plaintiff-Appellee,	D.C. NO. CV 84-3057-ER
v.	ORDER
DANIEL McCARTHY, MIDGE CARROLL, JOHN K. VAN DE KAMP,	
Defendants-Appellants.	

Before: ALARCON, BOOCHEVER and REINHARDT, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on

the suggestion for rehearing en banc.

Fed. R. app. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NARDELL U. CARTER, Petitioner, vs. DANIEL McCARTHY, DIRECTOR (CDC) MIDGE CARROLL, SUPERINTENDENT OF CORRECTIONS, SHERMAN BLOCK, SHERIFF OF LOS ANGELES COUNTY, Respondents.	No. CV 84-3057-ER(Mc) J U D G M E N T

Pursuant to the order of the court adopting the findings, conclusions, and recommendations of the United States Magistrate,

IT IS ADJUDGED that the Petition For Writ of Habeas Corpus is granted.

IT IS HEREBY ORDERED that:

1. Los Angeles Sheriff Sherman Block release the petitioner, Nardell U. Carter, from any custody attributable to a parole violation resulting from a parole granted to the petitioner as the result of the petitioner's plea of guilty in Los Angeles Superior Court, Case Nos. A 146996 and A 148140; and

2. The California Department of Corrections release the petitioner, Nardell U. Carter, from any further parole attributable to the petitioner's plea of guilty in Los Angeles Superior Court Case

Nos. A 146996 and A 148140.

DATED: This ___ day of July 24 1985.

EDWARD RAFEEDIE
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NARDELL U. CARTER, Petitioner, vs. DANIEL McCARTHY, DIRECTOR (CDC) MIDGE CARROLL, SUPERINTENDENT OF CORRECTIONS, SHERMAN BLOCK, SHERIFF OF LOS ANGELES COUNTY, Respondents.	No. CV 84-3057-ER(Mc) ORDER ADOPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE

Pursuant to 28 U.S.C. §636(B)(1)(B), the court has reviewed de novo the petition, all of the records and files herein, the attached Report and Recommendation of the United States Magistrate, the proposed Findings of Fact and the Reporter's Transcript of Proceedings conducted before the Magistrate

on May 22, 1985, and the Respondents' Objections to the Report and Recommendation, and concurs with and adopts the findings and conclusions of the Magistrate.

IT IS HEREBY ORDERED that the Petition For Writ of Habeas Corpus is granted.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate's Report and Recommendation and Final Report and Recommendation, and the Judgment herein by United States mail on the petitioner, on counsel for the

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petitioner, and on counsel for the respondents.

DATED: This __ day of July 29, 1985.

EDWARD RAFEEDIE
United States District Judge

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Ed Butler
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RESPONSE REQUESTED

ORIGINAL

(2)

Supreme Court, U.S.
FILED
AUG 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-1943

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

RECEIVED
AUG 27 1987
OFFICE OF THE CLERK
SUPREME COURT, U.S.

DANIEL McCARTHY,

Petitioner,

vs.

NARDELL U. CARTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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(4)

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, NARDELL U. CARTER, hereby petitions this Court for leave to proceed in forma pauperis.

Respondent was represented in the courts below by counsel appointed pursuant to the Criminal Justice Act of 1954, 18 U.S.C. section 3006A, and was therein permitted to proceed in forma pauperis.

Respectfully submitted,

JOSEPH F. WALSH

WILLIAM K. RASMUSSEN

Attorneys for Respondent
NARDELL U. CARTER

CERTIFICATE OF SERVICE

I, JOSEPH F. WALSH, a member of the Bar of this Court, hereby certify that on August 24, 1987, Respondent's MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

was served upon counsel listed below by depositing copies of same in the United States mail, with first class postage prepaid, addressed as follows:

SHARLENE A. HONNAKA
Deputy Attorney General
3580 Wilshire Boulevard
Los Angeles, California 90010

JOSEPH F. WALSH

NO. 86-1943

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

DANIEL McCARTHY,

Petitioner,

vs.

NARDELL U. CARTER,

Respondent.

OPPOSITION TO

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

DANIEL McCARTHY, Petitioner, vs. NARDELL U. CARTER, Respondent.	No. 86-1943 OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in Carter v. McCarthy, 806 F.2d 1373 (9th Cir. 1986).

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C., section 1254 and Rule 17 of the Rules of the Supreme Court.

QUESTIONS PRESENTED

1. Where a defendant in a criminal case enters into a plea bargain with a state prosecutor and is promised a specific number of years in custody as his sentence with no mention of parole, may the state authorities unilaterally impose parole status upon that defendant and incarcerate him for a period of time longer than the plea agreement upon a violation of his parole?

STATEMENT OF THE FACTS

In 1981, Respondent Nardell Carter was charged, in thirteen felony counts consolidated into two cases, with forgery and possession of stolen checks. Pursuant to a plea agreement on December 9, 1981, Respondent pleaded guilty in state court to

two counts of forgery and possession of stolen checks, with the understanding that he would receive a prison sentence of two years. The plea agreement did not address the conditions of parole eligibility or release, the prosecutor made no express promise as to parole, and neither the state court nor the prosecutor informed the Respondent that after he had completed the two year sentence he would be placed on parole and that he could receive further time in custody if he violated the terms of his parole.

On January 8, 1982, the trial court imposed a concurrent two-year state prison sentence on each count. On July 2, 1983, Respondent was arrested for residential burglary. He was also discovered in possession of stolen credit cards. He was found to be in violation of parole on September 28, 1983. His parole was revoked, and he was ordered returned to custody for a twelve-month period.

Respondent filed petitions for writ of habeas corpus in the superior court and in the California Court of Appeal. They were denied. Respondent filed a petition for writ of habeas corpus in the United States District Court, Central District of California, on April 30, 1984. On July 29, 1985, the District Court granted the petition for writ of habeas corpus and ordered that Respondent be released from any further parole attributable to his guilty plea.

In September, 1985, Petitioner appealed to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals held, in a published opinion filed December 23, 1986, that: (1) where a criminal statute imposes a mandatory parole term to be served following completion of the prison sentence, the parole term is a direct consequence of the guilty plea; (2) Respondent's plea was not voluntary and intelligent because he had not been fully aware of the parole period; and (3) the proper remedy was "specific performance" of the agreement, so that Respondent should be released from any further service of the parole term.

ARGUMENT

I

THE STATE'S INCARCERATION OF CARTER AS A PAROLE VIOLATOR RESULTED IN A BREACH OF THE TERMS OF HIS PLEA BARGAIN

Under California law, parole status is an additional punishment for the crime. It is not a procedure whereby the prisoner is released early from incarceration. Penal Code, section 3000(a) provides:

> (a) At the expiration of a term of imprisonment of one year and one day, or a term of imprisonment imposed pursuant to Section 1170, or at the expiration of such term as reduced pursuant to Section 2931, if applicable, the inmate shall be released on parole for a period not exceeding three years, unless the board for good cause waives parole and discharges the inmate from custody of the department.

A violation of parole conditions may lead to a revocation of parole status and the reincarceration of the released prisoner. Penal Code, section 3057(a) provides:

> (a) Confinement pursuant to a revocation of parole in the absence of a new conviction and commitment to prison under other provisions of law, shall not exceed 12 months, except as provided in subdivision (c).

Thus, parole in California is similar to the "special parole" provided for under the federal narcotics offense statute, 21 U.S.C., section 841. See Bifulco v. United States, 447 U.S. 381 (1980). Violation of either parole provisions increases the original sentence imposed by the trial judge.

When a guilty plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. Santobello v. New York, 404 U.S. 257, 262 (1971); United States v. Benchimol, 738 F.2d 1001, 1002 (9th Cir. 1984); United States v. Garcia, 519 F.2d 1343, 1345 (9th Cir. 1975). The failure of the state to honor its part of the bargain results in a violation of the accused's right to due process of law. The remedy for such a due process violation is either specific performance of the bargain or the accused may withdraw his guilty plea. Santobello v. New York, 404 U.S. 257 (1971).

In Santobello, a defendant agreed to plead guilty to possession of gambling records in exchange for the prosecuting attorney's agreement to make no recommendation as to the sentence. At sentencing, the defendant appeared before a different judge and was opposed by a different prosecuting attorney who recommended a maximum one year sentence. Although the defendant objected to the recommendation, the second prosecutor argued that there was nothing in the record to support the defendant's claim of a promise from the prosecution. The trial judge then sentenced the defendant to the maximum term.

The United States Supreme Court vacated the judgment stating that considerations which justify plea bargaining "presupposes fairness between an accused and a prosecutor." Santobello v. New York, supra, at 261. Among the necessary safeguards, "a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Santobello v. New York, supra, at 262.

Several cases in the Seventh Circuit have repeatedly held that a state criminal defendant must be specifically advised

that a guilty plea will result in the automatic imposition of a mandatory period of parole. United States ex rel. Johnson v. De Robertis, 718 F.2d 209 (7th Cir. 1983); United States ex rel. Williams v. Morris, 633 F.2d 71 (7th Cir. 1980); United States ex rel. Ferris v. Finkbeiner, 551 F.2d 185 (7th Cir. 1977); United States v. ex rel. Baker v. Finkbeiner, 551 F.2d 180 (7th Cir. 1977)

In United States ex rel. Baker v. Finkbeiner, supra, an Illinois criminal defendant agreed to plead guilty to certain criminal charges in exchange for a promise that he would serve from one to two years in prison. No mention was made of any parole condition during the guilty plea. Illinois law imposed a mandatory two-year term of parole upon a person convicted of the crime to which the defendant entered his guilty plea. The defendant sought federal habeas corpus relief seeking to annul the parole condition.

The Court held that the circumstances surrounding the entry of the plea violated the Due Process Clause if the sentence actually imposed upon the defendant significantly differed from the sentence which had been promised in the plea proceedings by the prosecutor and the trial court. United States ex rel. Baker v. Finkbeiner, supra, at 183. The Court ruled that it was a constitutional violation if the mandatory parole term constituted a "substantial addition" to the prison term promised in the plea bargain. The Court found that the two-year parole term constituted a significant additional punishment. The Court found that the defendant's guilty plea was unfairly induced. United States ex. rel. Baker v. Finkbeiner, supra, at 184. The precise holding of the Court appears at page 184 where the Court states:

> We do not find the imposition of a two-year parole term to be an insignificant punishment. The

conditions of parole place a number of onerous burdens on the liberty of paroled individuals. Moreover, a substantial number of parolees are compelled to return to prison for parole violations. Many of these violations are inevitably technical rather than criminal. This was true in Baker's case, and the consequences were hardly insignificant. Baker served thirty-two months in prison despite the fact that he had been promised a maximum of twenty-four months imprisonment in exchange for his guilty plea. He is still on parole, and could be further incarcerated for another parole violation.

We, therefore, hold that Baker's guilty plea was unfairly induced in violation of the Due Process Clause. The difference between the three to four years in custody he did receive and the one to two years in custody he was told he would receive is substantial enough to justify a finding that he was unfairly compelled to accept the detrimental elements of his bargain without realizing its benefits. (551 F.2d at 184).

When a state prosecutor enters into a plea bargain with a defendant and promises that defendant a certain number of years in custody in exchange for a guilty plea, that plea bargain must be honored by the state. If the prosecutor does not include the parole condition as a part of the plea agreement, the parole condition is not a part of the plea agreement and it cannot be later added to the agreement unilaterally by the state.

Penal Code, section 3000(a) states that a "sentence pursuant to Section...1170 shall include a period of parole, unless waived, as provided in this section." The section then states that parole shall be "for a period not exceeding three

years, unless the [parole] board for good cause waives parole and discharges the inmate from custody of the department." Penal Code, section 3000(a).

Thus, section 3000 of the Penal Code clearly authorizes a "waiver" of the post-incarceration parole period. It is true that only the parole board can waive it, but in this case, the state prosecutor effectively waived the parole period by omitting it in the plea bargain.

There remains the issue of the appropriate remedy in the present case. In this regard, it is well established that plea bargaining, although a matter of criminal jurisprudence, is subject to contract law standards. United States v. Arnett, 628 F.2d 1162, 1164 (9th Cir. 1979). In the present matter, Carter has already performed his side of the bargain. As outlined in United States ex rel. Baker v. Finkbeiner, 551 F. 2d 180, 184 (7th Cir. 1977), "Under the circumstances of this case, it would be unjust to simply vacate the guilty plea, which theoretically would allow the state to reindict Baker. Since he has already performed his side of the bargain, fundamental fairness demands that the state be compelled to adhere to the agreement as well." Carter has already served the two year prison term which was his side of the bargain. The state must now adhere to its side of the bargain and Carter's parole status must be declared void.

That is precisely what the courts below in this case have done. The decisions below comply with this Court's decision in Santobello v. New York, 404 U.S. 257 (1971). The state simply bargained away parole status in Respondent's case. The lower courts merely enforced the plea bargain.

CONCLUSION

Based upon the foregoing, Respondent urges the Court to deny the petition for writ of certiorari.

Respectfully submitted,

JOSEPH F. WALSH

WILLIAM K. RASMUSSEN

Attorneys for Respondent
NARDELL U. CARTER

CERTIFICATE OF SERVICE

I, JOSEPH F. WALSH, a member of the Bar of this Court, hereby certify that on August 24, 1987, Respondent's OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT was served upon counsel listed below by depositing copies of same in the United States mail, with first class postage prepaid, addressed as follows:

SHARLENE A. HONNAKA
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Joseph F. Walsh

JOSEPH F. WALSH